SUPREME COURT OF THE UNITED STATES.

No. 339.

WILLIAM H. BUSHNELL, PLAINTIFF IN ERROR,

vs.

S. H. KENNEDY & CO.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

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Writ of error from the Circuit Court of the United States, fifth judicial circuit and district of Louisiana, S. H. Kennedy & Co., defendants in error, vs. V. H. Bushnell, plaintiff in error, No. 5350; Sullivan, Billings & Hughes, for plaintiff; William H. Hunt, for defendants; returnable to the Supreme Court of the United States on the first Monday of December, 1868.

1 Circuit Court of the United States, fifth circuit and district of Louisiana.

S. H. KENNEDY & Co. *vs.* W. H. BUSHNELL. } No. 5350.

Transcript from the State Court.—Filed November 23d, 1867.

Third District Court of New Orleans, State of Louisiana.

S. H. KENNEDY & Co *vs.* W. H. BUSHNELL. } No. 23428.

Petition.—Filed May 18th, 1867.

To the honorable judge of the Third District Court of New Orleans:

The petition of S. H. Kennedy & Co., a commercial firm doing business in New Orleans, and composed of Samuel H. Ken-
2 nedy and , respectfuliy shows: That Mills & Frisby, co-partners in trade, were entrusted by petitioner with the sum of $10,000 in cash, on the 11th of Jannary, 1865, loaned by petitioners to them, for the purchase of cotton, to be bought by said Mills & Frisby in Baton Rouge and elsewhere, and to be shipped to petitioners in New Orleans.

That William H. Bushnell, who resides out of the State, being made aware of the fact aforesaid, borrowed from said Mills and Frisby said sum, solemnly promising to return the same within a few days; that in partial fulfillment of said promise said Bushnell did return the sum of $2,500 to said Mills & Frisby; but that he declined to return the balance of said sum when called on so to do, although well knowing that the whole of said sum had been borrowed
3 from petitioners in manner and form as aforesaid, and although said Bushnell promised and agreed at the time he borrowed said money it was to be returned within five or six days.

Petitioners aver that said Mills & Frisby have assigned and transferred to these petitioners all their rights and claims in and to the said indebtedness of said Bushnell.

Wherefore petitioners pray, the annexed bond and affidavit being considered, that a writ of attachment issue herein against said Bushnell; that O. B. Graham & Co., of New Orleans, be made garnishees herein, and be ordered to answer the annexed interrogatories, and after due proceedings, that petitioners have judgment against said

Bushnell for the said sum of $7,500, with interest from the 11th January, 1865, till paid, and also against said garnishees in like manner for said sum; and petitioners pray for a privilege and for all general relief.

(Signed) WILLIAM H. HUNT, *Att'y.*

Affidavit.

S. H. Kennedy, being duly sworn, deposes: That he is a member of the commercial firm of S. H. Kennedy & Co.; that the allegations of the foregoing petition are all true; that William H. Bushnell is indebted to said firm in the sum of $7,500, and interest from January the 11th, 1865, till paid; that said sum is really due and owing, and that said Bushnell resides out of the State.

(Signed) SAM'L H. KENNEDY.

Sworn to and subscribed before me this 18th May, 1867.

(Signed) PAUL W. COLLINS, *Third Justice.*

Interrogatories.

Interrogatories to be answered by O. B. Graham & Co., garnishees:

1st. Have you, or had you, at the time of service of process on you or your firm, in your hands, or in any manner under your control, any moneys, rights, credits, property or goods of any kind, belonging to the defendant, W. H. Bushnell, in whole or in part, or in which he is interested?

2d. Do such moneys, rights, etc., amount to the sum of $10,000? If not, to what sum do they amount?

(Signed) WILLIAM H. HUNT, *Att'y.*

Bond.

Know all men by these presents, that we, S. H. Kennedy & Co. and Thomas A. Adams, of the city of New Orleans, and State of Louisiana, are held and firmly bound unto W. H. Bushnell in the sum of eleven thousand dollars, lawful money of the United States of America, to be paid to the said W. H. Bushnell, his heirs, executors, administrators and assigns, for which payment well and truly be made we bind ourselves and each of us by himself, each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated the 18th day of May, in the year of our Lord 1867.

Whereas S. H. Kennedy & Co. have this day presented a petition to the honorable the Third District Court of New Orleans, praying for a writ of attachment:

Now the condition of the above obligation is, that we, the above bound, S. H. Kennedy & Co. and Tho's A. Adams, will well and truly pay to the said W. H. Bushnell, the defendant in said attachment,

all such damages as he may recover against us in case it should be decided that the said attachment was wrongfully obtained.

(Signed) SAM'L H. KENNEDY & CO.
(Signed) THO'S A. ADAMS.

Signed, sealed and delivered in presence of—
(Signed) HERNY N. OGDEN.

Order.

7 Let a writ of attachment issue in this case as herein prayed for and according to law, upon plaintiff giving bond, with good and solvent security, in the sum of eleven thousand dollars, conditioned as the law directs, and let the garnishees herein named be ordered to answer under oath and in writing within the legal delay the interrogatories to them herein propounded.

(Signed E. T. FELLOWES, *Judge*.

New Orleans, May 18th, 1867.

Writ of attachment.

The State of Louisiana, Third District Court of New Orleans.

The State of Louisiana to the sheriff of the parish of Orleans, greeting:

Whereas due proof has been made before the third District Court of New Orleans by S. H. Kennedy & Co. that W. H. Bush-
8 nell is indebted to them in the sum of $7,500, with interest, &c., and that said defendant resides permanently out of the State of Louisiana:

Now, therefore, you are commanded, in the name of the State of Louisiana and of the Third District Court of New Orleans, to seize and attach according to law, and take into your possession the goods and chattels, lands and tenements, rights and moneys, effects and credits of the said defendant, if any you find in said parish, to the amount of what will suffice to discharge the said debt and costs of suit; and that you give notice of this proceeding by leaving a copy thereof to be affixed at the door of the parish church of said parish, and make return of this writ and endorse thereon the manner in which you have executed it, before our said court, according to law.

9 Clerk's Office, 18th day of May, 1867.

[SEAL.] (Signed) E. A. LUMINAIS,
D'y Clerk.

Sheriff's return.

Received May 18th, 1867, and on the 20th day of same month and year posted a copy of the within writ at the door of the church of

St. Louis, parish of Orleans; also a copy of same at the door of the room where this honorable court holds its sitting.

Returned same day.

(Signed) HY. DOUSSAU,
D'y Sheriff.

Third District Court of New Orleans.

Citation to defendant.

S. H. KENNEDY & Co.
vs.
W. H. BUSHNELL. } No. 23428.

The State of Louisiana to Mr. W. H. Bushnell, of New Orleans:

You are hereby summoned to comply with the demand
10 contained in the petition, of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the Third District Court of New Orleans, in the city of New Orleans, ten days after the service hereof.

Witness the Honorable E. T. Fellowes, judge of the said court, the 3d day of June, in the year of our Lord, 1867.

[SEAL.] (Signed) E. A. LUMINAIS.
D'y Clerk.

Sheriff's return.

Received June 3d, 1867, and on the 4th day of the same month and year served a copy of the within citation and accompanying petition personally on W. H. Bushnell.

Returned same day.

(Signed) H. DOUSSAU,
D'y Sheriff.

Third District Court of New Orleans.

Citation to be posted.

S. H. KENNEDY & Co.
11 *vs.*
W. H. BUSHNELL. } No. 23428.

The State of Louisiana to Mr. W. H. Bushnell, residing out of the State of Louisiana:

You are hereby summoned to comply with the demand contained in the petition of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the Third District Court of New Orleans, in the city of New Orleans, in ten days after the service hereof.

Witness the Honorable E. T. Fellowes, judge of the said court, the 18th day of May, in the year of our Lord 1867.

(Signed) E. A. LUMINAIS,
D'y Clerk.

Sheriffs' return.

Received May 18th, 1867, and on the 20th day of same month and year posted a copy of the within citation at the door of the church of St. Louis, parish of Orleans; also a copy of same at
12 the door of the room where this honorable court holds its sitting.

Returned same day.

(Signed) H. DOUSSAU,
D'y Sheriff.

Third District Court of New Orleans.

Citation to garnishees.

S. H. KENNEDY & Co.
vs.
W. H. BUSHNELL.

STATE OF LOUISIANA:

State of Louisiana to Messrs. O. B. Graham & Co., of New Orleans:

You are hereby cited to declare on oath what property belonging to the defendant in this case you have in your possession, or in what sum you are indebted to said defendant, and also to answer in writing, under oath, the interrogatories annexed to the petition, of which a copy accompanies this citation, within ten days after the service hereof; otherwise judgment will be entered against you for the
13 amount claimed by the plaintiff with interest and costs.

Witness the Honorable E. T. Fellowes, judge of the said court, this 18th day of May, in the year of our Lord 1867.

[SEAL.] (Signed) E. A. LUMINAIS,
D'y Clerk.

Sheriff's return.

Received May 18th, 1867, and on same day, month and year served at 1½ p. m. copy of within citation and accompanying petition with interrogatories on O. B. Graham & Co., garnishees herein, by handing the same to Peter Anderson, whom I know to be a member of said firm.

Returned same day.

(Signed) L. SMITH,
D'y Sheriff.

Third District Court of New Orleans.

Answer of garnishees.—Filed May 25th, 1867.

14 S. H. KENNEDY & Co. vs. W. H. BUSHNELL. } No. 23428.

P. Anderson, of the firm of O. B. Graham & Co., made garnishees in the above-entitled suit, being duly sworn, answers to the interrogatories of the plantiffs as follows:

To the first and second interrogatories. To both of the interrogatories of the plaintiff he answers, No.

(Signed) P. ANDERSON.

Sworn to and subscribed before me this 25th day of May, 1867.

(Signed) G. H. BRAUGHN,
2d Justice of the Peace.

Petition for removal of suit, &c.—Filed June 11th, 1867.

To the Honorable E. T. Fellowes, judge of the Third District Court in the city of New Orleans:

The petition of Wm. H. Bushnell respectfully shows and states:

15 That a suit has been commenced against your petitioner in a court of the State of Louisiana, namely the Third District Court of New Orleans, by S. H. Kennedy & Co., a commercial firm doing business in said city, and composed of S. H. Kennedy, Jules Vairin and P. E. Mortimer, all the members of which firm are, and at the time of the commencement of said suit were citizens of the said State of Louisiana; that your petitioner is, and at the time of the commencement of said suit was a citizen of the State of Connecticut; and that the matter in dispute in said suit exceeds the sum and value of five hundred dollars, ($500,) exclusive of costs, the said suit being brought to recover the sum of seven thousand five hundred dollars, ($7,500.)

16 Wherefore your petitioner prays that the annexed affidavit and bond being considered, said suit may be removed for trial into the next Circuit Court of the United States to be holden in the district of Louisiana.

(Signed) WM. H. BUSHNELL.

Affidavit.

STATE OF LOUISIANA, *Parish of Orleans:*

William H. Bushnell being duly sworn says, that the foregoing petition is true.

(Signed) WM. H. BUSHNELL.

Sworn to and subscribed before me this 10th day of June, A. D. 1867.

(Signed) D. C. BYERLY, *Clerk.*

Bond.

Know all men by these presents, that we, William H. Bushnell as principal, and James S. Clark, of the parish of Orleans and State of Louisiana, as surety, are held and firmly bound unto S. H. Kennedy & Co. in the sum of twelve thousand dollars ($12,000) lawful
17 money of the United States, which sum we jointly and severally promise to pay to the said S. H. Kennedy & Co.

The condition of the foregoing obligation is such, that whereas the said S. H. Kennedy & Co. have commenced a suit against the said William H. Bushnell, in the Third District Court of New Orleans, which suit is numbered 23428 on the docket of said court, and whereas the said Wm. H. Bushnell has filed a petition in said court to remove said suit for trial to the next Circuit Court of the United States to be holden in the district of Louisiana:

Now if the said Wm. H. Bushnell shall, on the first day of the next session of said Circuit Court, file therein copies of the process against him in said suit, and shall at the same time enter his appearance in said Circuit Court, then and in that case the foregoing obligation shall be void, otherwise remain in full force and virtue.

Dated June 10th, A. D. 1867.

18 (Signed) W. H. BUSHNELL.
" JAMES S. CLARK.

Sealed and delivered in presence of—
(Signed) EDW'D C. BILLINGS.
" B. L. LYNCH.

Order tranferring case, &c.

The within petition, affidavit and bond being considered, it is ordered that the defendant, William H. Bushnell, have leave to remove and transfer this case from this court to the Circuit Court of the United States to be held in this district, upon defendant giving bond in the sum of twelve thousand dollars, with good and solvent security, conditioned as the law directs.

New Orleans, June 13th, 1867.

(Signed) E. T. FELLOWES, *Jud e.*

Third District Court of New Orleans, State of Louisiana.

Writ of attachment.—Issued on the 18th May, 1867.

19 The State of Louisiana to the sheriff of the parish of Orleans, greeting:

Whereas due proof has been made before the Third District Court of New Orleans, by S. H. Kennedy & Co., that W. H. Bushnell is indebted to them in the sum of $7,500, with interest, &c., and that the said defendant resides permanently out of the State of Louisiana:

Now, therefore, you are commanded, in the name of the State of Louisiana and of the Third District Court of New Orleans, to seize

and attach, according to law, and take into your possession the goods and chattels, lands and tenements, rights and moneys, effects and credits of the said defendant, if any you find in said parish, to the amount of what will suffice to discharge the said debt and costs of suit; and that you give notice of this proceeding by leaving a copy thereof at the last place of abode of the said defendant, if in
20 said parish, and causing a copy thereof to be affixed at the door of the parish church of said parish, and make return of this writ, and endorse thereon the manner in which you have executed it, before our court, according to law.

Clerk's Office, 18th day of May, 1867.

[SEAL.] (Signed) E. A. LUMINAIS,
D'y Clerk.

In the Third District Court of New Orleans.

Notice of seizure.

S. H. KENNEDY & Co.
vs.
W. H. BUSHNELL. } No. 23428.

NEW ORLEANS, *May 18th*, 1867.

SHERIFF'S OFFICE, *Parish of Orleans:*

State of Louisiana to O. B. Graham & Co.:

Please to take notice, that by virtue of a writ of attach-
21 ment issued in the above-mentioned suit, I seize in your hands all the goods, chattels, lands, tenements, rights and credits, moneys, effects, bills of exchange, promissory notes, or property of any kind which you may now or hereafter have in your possession or under your control belonging to the defendant, which you will hand over to me.

(Signed) L. LEITHDUCAT, *D'y Sheriff.*

Sheriff's return on notice.

On the 18th day of May, 1867, served a copy of within notice of seizure on O. B. Graham & Co., by handing the same to Peter Anderson, a member of said firm.

Returned same day.

(Signed) L. LEITHDUCAT, *D'p'y Sheriff.*

Sheriff's return on writ of attachment.—Issued on the 18th May, 1867

Received May 18th, 1867, and same day I made general seizure in hands of O. B. Graham & Co., from which nothing has yet
22 come into the hands of sheriff. No other property found or pointed out.

Returned July 5th, 1867.

Sheriff's fee, $1 50.

(Signed) JNO. P. SMITH, *D'y Sheriff.*

STATE OF LOUISIANA,
Third District Court of New Orleans:

I, Daniel C. Byerly, clerk of the Third District Court of New Orleans, do hereby certify that the above and foregoing twenty-two pages contain a full and complete transcript of all the proceedings had in the case wherein S. A. Kennedy & Co. are plaintiffs, and W. H. Bushnell is defendant, instituted in this court under the number 23428.

In testimony whereof I have hereunto set my had and affixed the seal of the said court, at the city of New Orleans, on
23 this fourth day of October, in the year of our Lord one thousand eight hundred and sixty-seven, and in the ninety-second year of the independence of the United States of America.

[SEAL.] (Signed) D. C. BYERLY, *Clerk.*

[5-c. internal revenue stamp affixed and cancelled.]

United States Circuit Court for the fifth judicial circuit and district of Louisiana.

Answer.—Filed November 25th, 1867.

Proceedings in the United States Circuit Court:

S. H. KENNEDY & Co.
vs.
WM. H. BUSHNELL. } No. 5350.

And now into this honorable court comes Wm. H. Bushnell, defendant herein, and for answer to plaintiff's petition denies each and every allegation therein contained.

24 Wherefore defendant prays that plaintiff's petition be rejected with costs.

(Signed) SULLIVAN, BILLINGS & HUGHES,
Def't's Att'ys.

Order.—Continuance.

Extract from the minutes of Thursday, January 30th, 1868:

S. H. KENNEDY & Co.,
vs.
WM. H. BUSHNELL. } No. 5350.

By consent of counsel this cause fixed for this day is continued till Thursday, 6th proximo, at 11 a. m.

U. S. Circuit Court.

Supplemental petition praying for jury, and order thereon.—Filed February 1st, 1868.

S. H. KENNEDY & Co.
vs.
W. H. BUSHNELL.

The supplemental petition of the plaintiffs herein respectfully shows, that they desire that this case be tried by a jury.

Wherefore they pray that it be so tried, and for all such other and further relief as the law may point out.

(Signed) WILLIAM H. HUNT,
Attorney.

Order.

Let this supplemental petition be filed.
February 1st, 1868.
(Signed) E. H. DURELL, *Judge.*

Marshal's return.

Received February 1st, 1868, by the U. S. marshal, and on same day of February, 1868, served a copy of within supplemental petition on Sullivan, Billings & Hughes, attorneys for defendant named herein, in the hands of E. C. Billings, a member of said firm, personally, at his office, 82 Custom-house street, in this city.
New Orleans, February 3d, 1868.

(Signed) S. W. REED,
Dep'y U. S. Marshal.

Order.—Continuance.

Extract from minutes of Thursday, 6th February, 1868:

S. H. KENNEDY & Co.
vs.
W. H. BUSHNELL. } No. 5350.

By consent of counsel, this cause fixed for this day is continued till Thursday, 13th instant, at 11 a. m.

Order.—Continuance.

Extract from minutes of Thursday, 13th February, 1868:

S. H. KENNEDY & Co.
vs.
W. H. BUSHNELL. } No. 5350.

By consent of counsel this cause, fixed for this day, is continued till 21st instant, at 11 a. m.

Order.—Continuance.

Extract from minutes of Friday, 21st February, 1868:

S. H. KENNEDY & Co.
vs.
W. H. BUSHNELL. } No. 5350.

By consent of counsel this cause, fixed for this day, is continued till the 28th instant, at 11 a. m.

27 *Order.—Continuance.*

Extract from minutes of Friday, 28th February, 1868:

S. H. KENNEDY & Co.
vs.
W. H. BUSHNELL. } No. 5350.

By consent of counsel this cause, fixed for this day, is continued till Friday, 6th proximo, at 11 a. m.

Order.—Trial by jury denied.

Extract from minutes of Friday, March 6th, 1868:

S. H. KENNEDY & Co.
vs.
W. H. BUSHNELL. } No. 5350.

This cause was called up to be tried before the court and a jury.

W. H. Hunt for plaintiffs; Sullivan, Billings & Hughes for defendant.

And the attorneys for the defendant having objected to a trial by jury, on the ground that plaintiffs filed their application after
28 the case had already been fixed for trial, which, upon examination of the record, was found to be the fact:

Ordered, that a jury trial be denied, and that the cause be taken up before the court.

And after hearing the pleadings, evidence and counsel, the cause is continued till the 13th instant.

U. S. Circuit Court, district of Louisiana.

Note of evidence.—Filed March 6th, 1868.

S. H. KENNEDY & Co.
vs.
W. H. BUSHNELL. } No. 5350.

Plaintiff offered in evidence record, Mills & Frisbee vs. W. H. Bushnell, 504 U. S. Provisional Court; also the answer of Frisbee to interrogatory on facts, and articles on file in said case.

29 *Judgment dismissing suit.*

Extract from the minutes of Saturday, 7th March, 1868:

S. H. KENNEDY & Co.
vs.
W. H. BUSHNELL. } No. 5350.

It is ordered and decreed by the court, that this suit be dismissed for want of jurisdiction, plaintiffs paying costs thereof.

Amendment to judgment.

Extract from minutes of Wednesday, March 11th, 1868:

S. H. KENNEDY & Co.
vs.
W. H. BUSHNELL. } No. 5350.

On motion of Wm. H. Hunt, esq., attorney for plaintiffs, it is ordered, that the decree herein made on 7th instant be so amended as to direct that, for want of jurisdiction, the cause be remanded to the 3d District Court of New Orleans, and that the costs incurred in this court be paid by the party at whose instance the same had been removed.

30 United States Circuit Court, fifth circuit and district of Louisiana, November term, 1867.

Judgment.—From judgment docket.

NEW ORLEANS, *March 7th*, 1868.

Court met pursuant to adjournment.
Present: Hon. E. H. Durell, district judge.

S. H. KENNEDY & Co.
vs.
WM. H. BUSHNELL. } No. 5350.

It is ordered and decreed by the court, that this suit be dismissed for want of jurisdiction, plaintiffs paying costs thereof.

Amendment to judgment.

NEW ORLEANS, *Wednesday, March 11th*, 1868.

Court met pursuant to adjournment.
Present: Hon. E. H. Durell, district judge.

S. H. KENNEDY & Co.
vs.
WM. H. BUSHNELL. } No. 5350.

31 On motion of Wm. H. Hunt, esq., attorney for plaintiffs, it is ordered, that the decree herein made on 7th instant

be so amended as to direct that, for want of jurisdiction, the cause be remanded to the 3d District Court of New Orleans, and that the costs incurred in this court be paid by the party at whose instance the same had been removed.

Judgment rendered March 7th, 1868.

Judgment signed March 12th, 1868.

(Signed) E. H. DURELL, *Judge.*

Petition for writ of error.—Filed March 14th, 1868.

S. H. KENNEDY, JULES VARIN and P. E. Mortimer, *vs.* WILLIAM H. BUSHNELL. } No. 5350.

To the honorable the judges of the Circuit Court of the United States for the fifth judicial circuit and district of Louisiana:

The petition of William H. Bushnell, defendant herein, re-
32 spectfully shows and states, that he is aggrieved by the final judgment rendered herein against him in the above-entitled action numbered 5350 on the docket of suits of this honorable court, and signed on the 12th day of March, A. D. 1868, and is informed that there is error therein to his prejudice, and is desirous that a writ of error be allowed him therefrom to the Supreme Court of the United States.

Wherefore he prays that a writ of error be allowed him returnable to the next term of the Supreme Court of the United States, and that the same may operate as a supersedeas upon his giving bond with good and solvent security in such amount as the court may direct and order; and as in duty bound will ever pray, &c.

(Signed) SULLIVAN, BILLINGS & HUGHES,
Att'ys for Def't, Wm. H. Bushnell.

Order granting a writ of error.

33 Extract from the minutes of Saturday, March 14th, 1868:

S. H. KENNEDY & Co. *vs.* W. H. BUSHNELL. } No. 5350.

On motion of Sullivan, Billings & Hughes, attorneys for defendant, and on filing petition praying that a writ of error be allowed and that the same may operate as a supersedeas, and the said defendant having offered his bond in the sum of twelve thousand dollars, with Edward Fulton as surety, and the said bond and surety having been accepted as sufficient:

It is ordered, that a writ of error be allowed from the judgment herein returnable in the Supreme Court of the United States on the first Monday of December next, and that the same operate as a supersedeas.

Bond for writ of error.—Filed March 14th, 1868

S. H. KENNEDY & Co.
vs.
34 W. H. BUSHNELL. } No. 5350.

Know all men by these presents, that we, William H. Bushnell, principal, and Edward Fulton, of the city of New Orleans and State of Louisiana, as surety, are held and firmly bound unto S. H. Kennedy & Co. in the full and just sum of twelve thousand dollars, to be paid to the said S H. Kennedy & Co., their certain attorney, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents. Sealed with our seals and dated this fourteenth day of March, in the year of our Lord one thousand eight hundred and sixty-eight. Whereas lately at a Circuit Court of the United States, fifth judicial circuit, holding sessions in and for the district of Louisiana, in a suit depending in said Circuit Court wherein S. H. Kennedy & Co. were plaintiffs, and
35 said William H. Bushnell was defendant, judgment was rendered against the said William H. Bushnell, and the said William H. Bushnell having obtained a writ of error and filed a copy thereof in the clerk's office of said Circuit Court to reverse the judgment in the aforesaid suit, and a citation directed to the said S. H. Kennedy & Co., and each of them, citing and admonishing them severally to be and appear at a Supreme Court of the United States to be holden at Washington, the first Monday of December next:

Now the condition of the above obligation is such, that if the said William H. Bushnell shall prosecute his writ to effect, and answer all damages and costs if he shall fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

[L. S.] (Signed) WM. H. BUSHNELL.
[L. S.] " E. FULTON.

36 Sealed and delivered in the presence of—
(Signed) EDWARD C. BILLINGS.

Record.

Mills & Frisbee vs. W. H. Bushnell, No. 504 U. S. Provisional Court, offered in evidence by plaintiff:

U. S. Provisional Court.

Petition.—Filed February 6th, 1865.

MILLS & FRISBEY
vs.
WM. H. BUSHNELL. } No. 504.

To the hon. the judges of the Provisional Court of the U. S. for the State of Lousiana:

The petition of A. H. Mills and R. Frisbey, jr., residents of Baton Rouge, partners in trade under the style of Mills & Frisbey, respectfully shews: That petitioners were entrusted by S. H.

Kennedy & Co., merchants of this city, with the sum of $10,000 in cash on the 11th of January, 1865, loaned by them to petitioners for the purchase of cotton to be bought by petitioners in Baton Rouge and elsewhere, and to be shipped to the said S. H. Kennedy & Co. That Wm. H. Bushnell, who resides out of the State, being made aware of the fact aforesaid, borrowed
37 from petitioners said sum, solemnly promising to return the same within a few days, and that in partial fulfillment of said promise said Bushnell did return the sum of $2,500 to petitioners, but that he declines to return the balance of said sum when called on so to do, altho' he knows full well that the whole of said sum had been borrowed by petitioners in manner and form as aforesaid. That said Bushnell has, by his unjust and unlawful acts, and false and fraudulent representations, caused to petitioners a loss of two thousand dollars, compelling them to travel about in search of him, and causing them to be deprived of profits they would have realized out of the sum aforesaid by investing the same, and rendering them liable to said Kennedy & Co. for the non-fullfilment of their contract; and that they claim damages for said amount from said Bushnell, of the N. O. Canal and Banking Co., of the Frst Nat. Bank of N. O. That said Bushnell has property in New Orleans liable to attachment, and especially in the hands of Clark & Fulton, and elsewhere. Wherefore petitioners pray, the annexed bond and affidavit being
38 considered, that a writ of attachment may issue for said sum of $7,500, and interest and costs, and that said Bushnell be cited to appear and answer this petition, and that said Clark and Fulton and New Orleans Banking Company and the First National Bank of New Orleans be made garnishees, and ordered to answer the interrogatories annexed, and after due proceedings, that petitioners have judgment against said Bushnell and said garnishees in solido for said sum of $7,500, with interest and costs, and against said Bushnell for the further sum of two thousand dollars damages, with interest and costs, and with privilege on the property attached, and for all general and equitable relief.

(Signed) WILLIAM H. HUNT, *Att'y.*

Interrogatories to John Clark and Edward Fulton, garnishees, the New Orleans Canal and Banking Company, and the First National Bank of New Orleans.

1st. Had you, at the time of service of process on you in this cause, or since, in your possession or under your control any money, rights, credits or property of any nature whatever belonging
39 either in whole or otherwise to the def't Wm. H. Bushnell?

2d. Do not such moneys, etc., amount to the sum of $10,000? If not to what sum do they amount?

(Signed) WILLIAM H. HUNT, *Att'y.*

Order.

Let a writ of attachment issue herein as prayed for, the plaintiffs giving bond with good and solvent security in the sum of fifteen thousand dollars, conditioned as the law directs; and it is ordered that the garnishees herein do answer under oath and in writing the interrogatories herein propounded within the legal delay.

New Orleans, February 6th, 1865.

(Signed) JOHN T. PEABODY, *Clerk.*

Bond annexed to petition and filed February 6th, 1865.

Know all men by these presents, that we, Mills & Frisbey, as principals, S. H. Kennedy & Co., as sureties, of the city of New Orleans and State of Louisiana, are held and firmly bound unto Wm. H. Bushnell in the sum of fifteen thousand dollars, lawful
40 money of the United States of America, to be paid by the said Wm. H. Bushnell, heirs, executors, administrators and assigns, for which payment well and truly to be made we bind ourselves, and each of us by himself, and each of our heirs, executors and administrators firmly by these presents.

Sealed with our seals and dated the day of February, in the year of our Lord, 1865.

Whereas Mills & Frisbey have this day presented a petition to the honorable the U. S. Prov'l Court for the State of Louisiana, praying for a writ of attachment:

Now the condition of the above obligation is, that we, the above bound Mills and Frisbey, and S. H. Kennedy & Co., will well and truly pay to the said Wm. H. Bushnell, the defendant in said attachment, all such damages as he may recover against us in case it should be decided that the said attachment was wrongfully obtained.

[L. S.] (Signed) MILLS & FRISBEY.
[L. S.] " S. H. KENNEDY & CO.

Signed, sealed and delivered in the presence of—
(Signed) W. H. HUNT.

U. S. Provisional Court.

Answer of defendant and interrogatories on facts and articles.—Filed March 3d, 1865.

41 MILLS & FRISBY
vs.
WILLIAM H. BUSHNELL. } No. 504.

U. S. Provisional Court.

MILLS & FRISBY
vs.
WM. H. BUSHNELL.

And now comes into court the defendant herein, and for answer to the petition of plaintiff denies each and every allegation in said petition contained. Wherefore he prays that said petition may be dismissed with costs, and for all general and special relief.

(Signed) SULLIVAN, BILLINGS & HUGHES,
Att'ys for Def't.

Affidavit.

STATE OF LOUISIANA, *Parish of Orleans, ss*:

William H. Bushnell, being duly sworn, says that the answers of plaintiff Frisby to the annexed interrogatories on facts and articles are important and material to the defence herein.

(Signed) WM. H. BUSHNELL.

Sworn to before me this 3d day of March, A. D. 1865.

42 (Signed) [SEAL.] SAMUEL MYERS,
2d Justice of the Peace, Parish of Orleans.

[15-c. int. rev. stamp affixed and cancelled.]

Interrogatories on facts and articles to be propounded to plaintiff, R. Frisby.

MILLS & FRISBY
vs.
WM. H. BUSHNELL.

Int. 1st. Did you not, on or about the 28th of January, A. D. 1865, have a full and final settlement with the defendant herein, Wm. H. Bushnell, at or near Baton Rouge?

Int. 2d. When said settlement was made, did not you and the defendant agree that there was you due a certain balance, and did not this defendant, Bushnell, pay you the said balance?

(Signed) SULLIVAN, BILLINGS & HUGHES,
Defendant's Att'ys.

Order.

Let the within answer and interrogatories be filed, and as prayed for. It is ordered that plaintiff, R. Frisby, answer under oath, and within a delay of fifteen days from date hereof, the annexed in-

43 terrogatories on facts and articles, and that this order and a copy of the within interrogatories so propounded to plaintiff be served on this counsel of record according to law.

New Orleans, 3d March, 1865.

(Signed) JOHN PEABODY, *Clerk.*

U. S. Provisional Court.

Commission and answer annexed.—Answer of plaintiff to interrogatories

MILLS & FRISBY
vs.
WM. H. BUSHNELL. } No. 504.

United States Provisional Court for the State of Louisiana.

MILLS & FRISBY
vs.
WM. H. BUSHNELL.

The President of the United States of America to any Louisiana commissioner or United States commissioner in Hartford, Conn., greeting:

Know ye, that we, reposing confidence in your prudence and fidelity, do by these presents give into your authority diligently to take the answers of the plaintiff, R. Frisby to the interroga-
44 tories to him propounded.

Therefore we desire you that at certain times and places by you to be appointed for that purpose, you cause the said witnesses to come before you, that you then and there examine them apart, upon their respective corporal oaths, first taken before you, upon the Holy Evangelist; that you reduce their examination to writing, and when you shall have so taken them, that you send the same, with this commission, closed up under your seal, to us in our said court at the city of New Orleans, without delay.

Witness the Honorable Charles A. Peabody, judge United States Provisional Court, this ninth day of March, in the year of our Lord one thousand eight hundred and sixty-five, and in the eighty-ninth year of the independence of the United States.

(Signed) [SEAL.] JOHN T. PEABODY, *Cl'k*,
By JOHN F. BREMER, *Dep'y Clerk*.

Interrogatories on facts and articles to be propounded to plaintiff, R. Frisby.

MILLS & FRISBY
vs.
WM. H. BUSHNELL.

45 Int. 1st. Did you not, on or about the 28th of January, A. D. 1865, have a full and final settlement with the defendant herein, Wm. H. Bushnell, at or near Baton Rouge?

Int. 2d. When said settlement was made, did not you and the defendant agree that then was your due a certain balance, and did not this defendant, Bushnell, pay you the said balance.

(Signed) SULLIVAN, BILLINGS & HUGHES,
Deft's Atty's.

Let the within answer and interrogatories be filed, and as prayed for. It is ordered that plaintiff, R. Frisby, answer under oath, and within a delay of fifteen days from date hereof, the annexed interrogatories on facts and articles, and that this order and a copy of the within interrogatories so propounded to plaintiff be served on their counsel of record according to law.

New Orleans, March 3d, 1865.

(Signed) JOHN T. PEABODY, *Cl'k.*

A true copy:
N. O., March 6, 1865.

[SEAL.] (Signed) JOHN T. PEABODY, *Cl'k,*
By JOHN F. BREMER,
Dep'y Cl'k.

46 *Answer of plaintiff to interrogatories.*

STATE OF CONNECTICUT,
City and County of Hartford:

Be it remembered that I, Edward Goodman, of the city, town and county of Hartford and State of Connecticut, a commisioner duly commissioned and qualified to take depositions, acknowledgments and proof of deeds, administer oaths and affirmations, in the county and State aforesaid, for the State of Louisiana, under the laws of Louisiana, hereby certify that, acting by virtue of and in obedience to the enclosed and annexed commission, issued out of the United States Provisional Court for the State of Louisiana, in the case entitled Mills & Frisby vs. William H. Bushnell, I have cited R. Frisby, jr., of the city, town and county of Hartford and State of Connecticut, one of the plaintiffs and a witness for the defendant in the above cause, to appear before me, at my office in the city, town and county of Hartford and State of Connecticut, on this the twenty-seventh day of March, one thousand eight hundred
47 and sixty-five, and being then and there duly sworn upon the Holy Evangelist to declare the truth on the questions and cross-questions put to him in said cause, answered as follows to the questions annexed to said commission, to wit:

To interrogatory first the witness answered: No; I did not have a settlement with Mr. Wm. H. Bushnell about the 20th day of January, 1865. Mr. Wm. H. Bushnell about that time accompanied me to Baton Rouge, and I told him that Mills & Frisby had received from S. H. Kennedy & Co. ten thousand dollars with which to purchase, and said cotton to send S. H. Kennedy & Co., New Orleans. Bushnell congratulated me upon my prospects, hoped that I would make money, and offered to assist me in any way in his power. I told him I was anxious to make money for several reasons; one of which was to pay him an old indebtedness that I owed him. When we reached Baton Rouge the roads were in a bad condition, so that I would not be able to do anything for several days. Mr. Bushnell

persuaded me to loan him the ten thousand dollars for
48 five or six days, during which time Mr. Bushnell said that he could make three or six thousand dollars for me. This took place on Friday, and he promised and agreed to return me the ten thousand dollars by the next Thursday, which would have been in ample time for any operations that Mills & Frisby would enter into. Bushnell, at the time I let him have the ten thousand dollars knew perfectly well that the money I let him have was not my own. Mr. Bushnell persuaded me that he would make several thousand dollars for me. He said that he would not charge me anything for his time or trouble, and he agreed that only the profits that should be made should be placed to my, Frisby's, credit on the old account, and that the transactions could not in any manner work to the prejudice of Mills & Frisby, and that they should have their ten thousand dollars back within five or six days. I consented to the arrangement and I handed him the original package of money, which had never been opened from the time when I saw the money
49 counted and put in the package. The package contained ten thousand dollars, and was then marked Mills & Frisby. Mr. Bushnell did not make any operation for me with the money I had let him have, but a few days afterwards he returned to me, through the hands of a Mr. Cahoell, twenty-five hundred dollars of the money, and no more. The remaining part, viz., seven thousand and five hundred dollars of the same, never was returned to me.

To interrogatory second the witness answered: No; we did not agree upon a certain balance that was due me, Frisby, and Bushnell did not pay me any such balance; but, finding that Bushnell would not return me the whole of the ten thousand dollars that I had let him in the manner and for the purpose stated in my answer to first interrogatory, and which he knew did not belong to me, I charged him with bad faith, and told him that he was doing wrong to retain other people's money to pay my indebtedness to him. Bush-
50 nell's treachery nearly made me crazy, and not knowing what to do or how to face my friends, I told Mr. Bushnell that if he was determined to keep and retain the money, at least to let me have money enough to go home with, and Bushnell then handed me two hundred and fifty dollars, and no more.

(Signed RUSSEL FRISBEY, JR.

Sworn to and subscribed before me on this the twenty-seventh day of March, 1865, at the place aforesaid above.

(Signed) EDWARD GOODMAN,
Commissioner.

STATE OF CONNECTICUT,
City and County of Hartford:

I, Edward Goodman, do hereby certify that the foregoing deposition was reduced to writing as aforesaid by me, and that the same was signed as above by the witness in my presence.

In witness whereof I have hereunto set my hand and affixed my official seal at my office in Hartford, in the State of Connecticut, on this the 27th day of March, 1865.

[SEAL.] (Signed) EDWARD GOODMAN,
51 *Commissioner for Louisiana, in Hartford, Conn.*

Fees seven dollars.

[5-cent int. rev. stamp affixed and cancelled.]

United States Provisional Court for the State of Louisiana.

Rule to show cause.—Filed April 17th, 1865.

MILLS & FRISBIE
vs.
WM. H. BUSHNELL. } No. 504.

MILLS & FRISBIE
vs.
WM. H. BUSHNELL.

Upon motion of Sullivan Billings & Hughes, of counsel for defendant, it is ordered that the plaintiffs, or their counsel, show cause on the 22d day of April, 1865, at 11 o'clock a. m., why the following portions of the answers of defendant Frisbie to interrogatories propounded by defendant to him should not be stricken out as irrelevant to the matters upon which he was interrogated, namely:

All of the answer to interrogatory 1st excepting the statement,
"No, I did not have a settlement with Mr. William H. Bush-
52 nell about the 28th day of January, A. D. 1865," and all of the answer to interrogatory 2d, except the statement, "We did not agree upon a certain balance that was due me, Frisbie, and Bushnell did not pay me any such balance."

And why such further and other order should not be entered as may be just.

U. S. Provisional Court.

Assignment.—Filed April 26th, 1865.

MILLS & FRISBEY
vs.
W. H. BUSHNELL.

We do hereby, for value received, assign to S. H. Kennedy & Co. all our right, title and interest in the above-named suit.

New Orleans, April 26th, 1865.

(Signed) MILLS & FRISBEY.

Witness:

(Signed) JULIUS VAIRIN.

U. S. Provisional Court.

Order.—Subrogation.—Filed April 26th, 1865.

MILLS & FRISBEY
vs.
WM. H. BUSHNELL.

53 On motion of Wm. H. Hunt, attorney for plaintiffs, and on filing an assignment by said plaintiffs of all their right, title and interest in this cause in favor of S. H. Kennedy & Co., it is ordered that S. H. Kennedy & Co. be entered of record as parties herein, and subrogated to all the rights of said plaintiffs therein.

U. S. Provisional Court.

Decision.—Filed May 6th, 1865.

MILLS & FRISBY
vs.
WM. H. BUSHNELL. } No. 504.

Contrary to my first impression, I find on examination of the authorities that the parts of the answers objected to seem to be allowed by the practice established. The matter introduced is connected with the subject inquired of in a manner, and I think that the rule to show cause must be denied.

Document found in the record but not filed.

N. O., JANUARY 11TH, 1865.

54 The following agreement and understanding is hereby entered into between S. H. Kennedy & Co., of this city, and A. H. Mills and R. Frisbey, jr., viz: The said A. H. Mills and R. Frisbey, jr., having received the sum of ten thousand dollars in cash, as a loan, for the purpose of proceeding to Baton Rouge for the purchase of cotton, and said cotton to be shipped by them to O. N. Cutler, to whom it is sold, under the trade regulations, and the said A. H. Mills and R. Frisbey, jr., having granted a power of attorney to said S. H. Kennedy & Co. to act for them as their full and complete attornies to repurchase, ship and dispose of said cotton or to collect the payment of said sales, it is hereby agreed that said S. H. Kennedy & Co. are to receive in compensation for their services, and for advancing said funds, and for the management of the sales, repurchase, shipment, &c., a commission of five per centum on the nett price allowed by said O. N. Cutler in purchasing said cotton. It is further agreed that the same commission shall be charged on all further advances and transactions connected with the purchase
55 of cotton by said Mills & Frisbey in Baton Rouge, who agree that all their transactions in cotton at Baton Rouge shall be

in the said S. H. Kennedy & Co. as their agents. The said S. H. Kennedy & Co. shall not be called upon to advance more than twelve thousand dollars at any one time, (unless by further agreement in writing.) Should S. H. Kennedy & Co. be called upon to purchase any supplies by the said Mills & Frisbey, they, S. H. K. & Co., are to charge a commission of two and one-half per centum on all such purchases, and the amount of said supplies to be a portion of the sum or sums advanced to said Mills & Frisbey under this agreement.

It is further understood and agreed that a regular account current will be kept and made up bearing interest, debit and credit, at the rate of seven per centum per annum, to be rendered by the said S. H. Kennedy & Co. Should it happen that no cotton can be obtained within fifteen days, then the sum loaned shall be subject to a commission of two and a half per cent. and interest; and this agreement may be terminated within twenty days on the repayment
56 of the sum advanced.

(Signed in duplicate.)

(Signed) S.H. KENNEDY & CO.
" A. H. MILLS.
" RUSSELL FRISBEY, JR.

Witness:
(Signed) MOSES HARRIS.
[5-cent int. rev. stamp affixed and cancelled.]

Proceedings in the U. S. Circuit Court.

Motion and order to docket cause.

Extract from the minutes:

U. S. Circuit Court 5th circuit and district of Louisiana.—November term, 1866.

NEW ORLEANS, *Thursday, January 31st*, 1867.

Court met pursuant to adjournment.
Present: Hon. E. H. Durell, district judge.

MILLS & FRISBEY
vs. } No. 5148.
W. H. BUSHELL.

On motion of Wm. H. Hunt, att'y for plaintiffs, it is ordered that this suit pending before the late U. S. Provisional Court, and
57 which the Circuit Court has jurisdiction, be transferred therefrom and placed upon the docket of this court, and that the defendant have notice of this order.

Rule to show cause.

Extract from the minutes of Wednesday, February 6th, 1867:

MILLS & FRISBEY
vs.
W. H. BUSHNELL. } No. 5148.

On motion of Sullivan Billings & Hughes, attorneys for defendant, it is ordered that the plaintiffs show cause, on the 14th day of February, 1867, at 11 a. m., why this case should not be stricken from the docket of this court on the grounds now filed.

Grounds filed February 6th, 1867.

Circuit Court of the U. S., 5th circuit and district of Louisiana.

A. H. MILLS & FRISBIE
vs.
W. H. BUSHNELL.

On motion of Sullivan, Billings & Hughes, attorneys for defendant, it is ordered that the plaintiff show cause, on the 14th day of
58 February, 1867, at 11 a. m., why this case should not be stricken from the docket of this court, on the ground that this court could not, and cannot, take jurisdiction of the same under the laws of the United States, and that this suit could not have been instituted in this court for the reason that the plaintiff Mills was, at the time this suit was instituted, a citizen of Iowa, and is now a citizen of that State, or of some State of the United States other than Louisiana; that the plaintiff Frisbey was at said time, and is now, a citizen of the State of Connecticut, and that the defendant at said time was, and is now, also a citizen of the State of Connecticut.

Marshal's return on the foregoing.

Received February 12th, 1867, and same day served a copy of the within motion and order on W. O. Denegre, esq., at the office of Wm. H. Hunt, esq., at 80 Custom-house street, in this city, he being attorney for plaintiffs in the within-entitled suit.

New Orleans, February 12th, 1867.

(Signed) M. EGAN,
D'y U. S. Marshal.

Nota.

Testimony taken on behalf of defendant, on rule to strike from the docket, to be found transcribed at page 61.

59 *Hearing and submission of rule.*

Extract from the minutes of Monday, March 4th, 1867:

MILLS & FRISBEY
vs.
W. H. BUSHNELL. } No. 5148.

The rule taken by defendant on 6th February last came up for trial, Sullivan, Billings & Hughes, for plaintiff in rule.

W. H. Hunt, for defendant in rule, not present, when the attorneys for the defendant submitted the same upon the pleadings and the evidence in the record.

Judgment on rule.

Extract from the minutes of Monday, May 13th, 1867:

MILLS & FRISBEY
vs.
WM. H. BUSHNELL. } No. 5148.

For reasons orally assigned, it is ordered that this case be stricken from the docket, and that the record be returned to the clerk of the District Court of the U. S. for the district of Louisiana, for safe keeping, agreeably to the act of Congress of 28th July, 1866.

60 *Order.*

Judgment set aside and a new trial granted.

Extract from the minutes of Monday, May 15th, 1867:

MILLS & FRISBEY
vs.
WM. H. BUSHNELL. } No. 5148.

On motion of Wm. H. Hunt, attorney for plaintiffs, on suggesting to the court that this case was submitted through error, and on filing consent of defendant's attorney, it is ordered that a new trial be had in the same, and the judgment therein be set aside, and that the motion to dismiss herein be assigned for argument for Monday, 20th instant, at 11 a. m.

Circuit Court of the United States, fifth circuit and district of Louisiana.—April term, 1867.

Final judgment from judgment docket.

NEW ORLEANS, MONDAY, *May 20th*, 1867.

Court met pursuant to adjournment. Present: Hon. E. H. Durell, district judge. Absent: Hon. J. M. Wayne, presiding judge.

61 MILLS & FRISBEY
vs.
WM. H. BUSHNELL. } No. 5148.

This cause came up for trial on defendant's motion to dismiss, Hunt & Denegre for plaintiffs, Sullivan, Billings & Hughes for de-

fendant, when, after hearing counsel, it is ordered and decreed that the cause be stricken from the docket, and the record returned to the clerk of the U. S. District Court for the district of Louisiana, for safe keeping, agreeably to the statute of 28th July, 1866.

Judgment rendered May 20th, 1867.

Judgment signed May 24th, 1867.

(Signed) E. H. DURELL, *Judge.*

In United States Circuit Court.

Testimony taken by consent for defendant on rule to strike from the docket, and filed February 25th, 1867.

MILLS & FRISBEY
vs.
WM. H. BUSHNELL. } No. 5148.

My name is Lionel A. Sheldon; I reside in the city of New
62 Orleans, and am a practicing attorney-at-law. I am well acquainted with the plaintiff, Allen H. Mills, and have known him since April, 1864. Mills has told me repeatedly that at the commencement of the war he was a citizen of the State of Iowa, residing at the city of Dubuque, and that he was still a citizen of that State; that his family had never come to Louisiana, and that he was in Louisiana only for temporary purposes. He is a married man, and has been ever since I have known him. He has as often told me that he never intended to become a citizen of this State. He made these statements to me in April or May, 1864, at Baton Rouge, and during the month of March and April, 1865, he made the same or similar statements at the City Hotel, and in my office in this city. He left New Orleans in June or July, 1865, and I went with him to the boat when he left. He expressed his intention not to return here. I saw him on the 18th October, 1866, in New York city, when he told me he retained his residence in Dubuque and intended to
63 go back there as soon as he completed a railroad which he was then building in the State of Virginia. Mills was never a citizen of the State of Louisiana, and never intended to be, according to his repeated statements made to me. Before he went to Iowa he lived in the State of New York, where, he has told me, he was born and raised.

(Signed) L. A. SHELDON.

Sworn to and subscribed before me, this 25th Febr'y, 1867.

(Signed) K. LAEW,
D'y Cl'k Dist. Court.

U. S. Circuit Court.

MILLS & FRISBEY
vs.
WM. H. BUSHNELL. } No. 5148

Robert H. McMillan, being duly sworn, says, for the defendant, says: I reside in the city of New Orleans. I know R. Frisbey, jr., one of the plaintiffs. I have known him for the past four years. In February 1865, I do not consider that Mr. Frisbey resided
64 here. I do not consider that he has resided here at any time since. His home was at that time, and has since been, in or near Hartford, Connecticut. I know this from his own statement. His family have continued in Hartford. His wife came here in the spring of 1864, and remained about eight weeks. During that time they boarded on Rampart street. With that exception, his family have remained at Hartford. Mr. Frisbey came here in the fall of 1863, from Connecticut. He went first to Baton Rouge. He remained there, I should think, about two or three months. He had a stock of goods there. Then he went to Texas. I do not know how long he remained there. He told me his home was in Connecticut. He returned to Connecticut about January, 1865, and has not since been here.

(Signed) ROB'T H. McMILLAN.

Sworn to and subscribed before me, this 25th February, 1867.
(Signed) CHAS. CLAIBORNE,
U. S. Comm'r.

Henry H. Drake, being duly sworn for defendant, says: That
65 he has read the foregoing deposition of Robert H. McMillan, and that he adopts the same as his own.

(Signed) HENRY H. DRAKE.

Sworn to and subscribed before me this 25th day of February, 1867.
(Signed) CHAS. CLAIBORNE,
U. S. Comm'r.

William H. Bushnell, being duly sworn, says: I am the defendant herein. I was at the commencement of this action, and have since been, and now am a citizen of the State of Connecticut. I rent a house in New Hartford, Connecticut; have rented the same house for six years. During that time my wife and family have lived there. I am preparing to build a house there. I have been in Louisiana only for temporary purposes. I know that plaintiff, Frisbey, is a citizen of Connecticut. I know that he has kept house there since 1863. His family, which consists of a wife and five children, have lived there during the whole time, since and during the year 1863. His wife visited him for her health in the spring of 1864. She remained but a few weeks. He told me that he was here but temporarily,
66 was following up the army for speculation, and that his home

was in Connecticut. I also know plaintiff, S. H. Mills. He has never resided in this State. He came here from Dubuque, Iowa, in the fall of 1863, leaving his wife and child at the last-mentioned place, who continued there. He was here off and on till the summer of 1865, when he went north, and has not returned. He told me repeatedly that Iowa was his home, and that nothing would induce him to come here to live; that he wanted to make a little money, and then go home.

(Signed) WM. H. BUSHNELL.

Sworn to and subscribed before me this 25th day of February, 1867.

(Signed) CH'S CLAIBORNE,
U. S. Comm'r.

67 UNITED STATES OF AMERICA,
Circuit Court of the United States,
Fifth Circuit and Distr. of Louisiana:

CLERK'S OFFICE.

I, Dominick Urban, clerk of the Circuit Court of the United States, for fifth circuit and district of Louisiana, do hereby certify, that the foregoing 66 pages contain and form a full, complete, true and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial of the case of S. H. Kennedy & Co. vs. Wm. H. Bushnell, No. 5350 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 2d day of December, A. D., 1868.

[SEAL.] D. URBAN, *Clerk.*

[5-c. int. rev. stamp, cancelled.]

I, E. H. Durell, United States judge for the district of Louisiana, do hereby certify, that Dominick Urban, whose name is signed to the above certificate as clerk of the Circuit Court of the United States for the fifth circuit and district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 2d day of December, A. D. 1868.

E. H. DURELL, *Judge.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the Circuit Court of the United States in and for the fifth circuit, and holding sessions for the district of Louisiana, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or one of you, between S. H. Kennedy & Co., plaintiffs, and

William H. Bushnell, defendant, a manifest error hath happened, to the great damage of the said William H. Bushnell, as by his complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this fourteenth day of March, in the year of our Lord one thousand eight hundred and sixty-eight.

[SEAL.] D. URBAN,
Clerk of the United States Circuit Court for District of Louisiana.

Endorsed: United States Circuit Court. No. 5350. S. H. Kennedy & Co. vs. W. H. Bushnell. Writ of error. Filed March 14th, 1868. F. B. Vinot, d'y cl'k.

THE UNITED STATES OF AMERICA, *District of Louisiana*:

The President of the United States to S. H. Kennedy & Co., a commercial firm composed of Samuel H. Kennedy and , greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the fifth circuit and district of Louisiana, wherein William H. Bushnell is plaintiff in error, and you are defendants, to show cause, if any there be, why the judgment rendered against the said plaintiff, as in said writ mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 16th day of March, in the year of our Lord one thousand eight hundred and sixty-eight.

E. H. DURELL, *Judge.*

Endorsed: United States Circuit Court. No. 5350. S. H. Kennedy & Co. vs. W. H. Bushnell. Citation in error.

Marshal's return.

Received Mar. 16, 1868, by the U. S. marshal, and on 19 day of M'ch, '68, served copy of within citation in error on S. H. Kennedy & Co., named herein, in the hands of S. H. Kennedy, pl'ff, at store, 55 Poydras street, in this city.

New Orleans, M'ch 20, '68.

S. W. REED, *D'y U. S. Marshal.*

O

Supreme Court of the United States.

DECEMBER TERM, 1869.—No. 131.

WILLIAM H. BUSHNELL, Plaintiff in Error,

vs.

S. H. KENNEDY & CO., Defendants in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR EASTERN DISTRICT OF LOUISIANA.

BRIEF OF PLAINTIFF IN ERROR.

J. HUBLEY ASHTON,
Of Counsel.

M'GILL & WITHEROW, PRINTERS, WASHINGTON, D. C.

In the Supreme Court of the United States.

DECEMBER TERM, 1869.

WILLIAM H. BUSHNELL, plaintiff in error,
vs.
S. H. KENNEDY & Co., defendants in error,
No. 131.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

BRIEF FOR PLAINTIFF IN ERROR.

THE CASE.

This is a writ of error to a judgment or order of the court below, remanding this cause to the State court in New Orleans, from which it had been removed to the circuit court, under the 12th section of the judiciary act of 1789.

Kennedy & Co., the defendants in error, citizens of Louisiana, brought suit in the third district court of New Orleans against William H. Bushnell, the plaintiff in error, a citizen of Connecticut, to recover the sum of $7,500.

The plaintiffs alleged in their petition that they had entrusted the firm of Mills & Frisbey with this sum in cash, for the purchase of cotton on their account; that the defendant, Bushnell, knowing this fact, borrowed the money from Mills & Frisbey, and promised to return it in a few days; that Bushnell, the defendant, although requested to return the money, declined to do so; and that Mills & Frisbey had as-

signed to the plaintiffs all their right and claim in and to the said indebtedness of the defendant, Bushnell. (Rec., p. 1.)

Bushnell thereupon, in due time and form, petitioned the State court for an order removing the cause into the next circuit court of the United States, alleging that the plaintiffs were citizens of Louisiana, the State in which the suit was brought, and that the defendant was a citizen of Connecticut. (Rec., p. 6.)

An order removing the cause into the circuit court was made by the State court; the requisite security was given by the defendant; and a transcript of the proceedings in the State court was duly filed in the circuit court. (Rec., p. 7.)

The defendant then filed in the circuit court his answer to the petition, being a general denial of its allegations. (Rec., p. 9.)

The cause was ordered for trial before the court, (Rec., p. 11,) when, after hearing the pleadings, evidence and counsel, the court below ordered and decreed, that the cause be remanded, for want of jurisdiction, to the third district court of New Orleans. (Rec., pp. 12–13.)

The defendant then sued out the present writ of error.

POINTS.

First Point.—A writ of error will lie to an order or judgment of the circuit court remanding a cause, removed under the 12th section of the judiciary act, back to the State court; and this court will reverse the decision of the circuit court, if erroneous.

Wood *et al. vs.* Davis, 18 How., 468.

Second Point.—The prohibition or restriction contained in the 11th section of the judiciary act of 1789 against or upon the exercise of jurisdiction by the circuit court in a suit to recover the contents of a chose in action in favor of an as-

signee, unless a suit might have been prosecuted in that court by the assignor to recover such contents, does not extend to a suit commenced in a State court by a citizen of the State in which the suit is brought against a citizen of another State, of which the circuit court has obtained jurisdiction by process of removal under and in pursuance of the 12th section of the act of 1789.

I. It will be remembered that the 11th section of the judiciary act is devoted to a definition of the original jurisdiction of the circuit courts. (1 Statutes-at-Large, 78.) It provides "that the circuit courts shall have *original* cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, when the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and the United States are plaintiffs or petitioners, . . or the suit is between a citizen of the State where the suit is brought and a citizen of another State. . . . . Nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange."

Having thus conferred and limited the original jurisdiction, Congress proceeds, in the 12th section, to confer a different species of jurisdiction, and provides—

"That if a suit be commenced in any State court against an alien, or by a citizen of the State in which the suit is brought against a citizen of another State, . . . and the defendant shall, at the time of entering his appearance in such State court, file a petition for the *removal* of the cause for trial into the next circuit court, . . . it shall then be the duty of the State court to accept the surety, and proceed no further in the cause, . . . and the cause shall then proceed in the same manner as if it had been brought by *original process*." (1 Stats., 79.)

Thus, it will be observed that the restrictive provision in

regard to suits by assignees of choses in action is contained in the section conferring original jurisdiction, and is not found in the 12th section, which relates to a certain description of suits within the judicial power of the United States in virtue of the character of the parties, brought by original process in State courts, and which provides for the removal of such suits from the State courts, and the exercise of jurisdiction in them by the circuit courts.

Mr. Justice Story doubted the authority of Congress under the Constitution to create such an exception as that found in the 11th section in suits between citizens of different States, (Bullard *vs.* Bell, 1 Mason, 251;) and obviously it should not be extended beyond the reach of the particular mischief which the exception or restriction was intended to guard against.

What that was we know. Chief Justice Marshall has explained in two cases the reason of the exception.

Sere *vs.* Pitot, 6 Cranch, 335.

Bank of the United States *vs.* Planters' Bank of Georgia, 9 Wh., 909.

In the latter case the chief justice said:

"It was apprehended that bonds and notes given in the usual course of business, by citizens of the same State to each other, might be assigned to the citizens of another State, and thus render the maker liable to a suit in the federal court."

Now, it is obvious that the holder, by assignment, of a negotiable instrument, where the maker is a citizen of a different State, would always prefer to sue him in a court of the State of which he, the holder, is a citizen. As between a State court and the circuit court of the State of which the maker is a citizen, the indorsee of such an instrument would undoubtedly prefer, as a general rule, the federal jurisdiction, as farthest removed from the local influences which might operate in favor of the maker. But, as between the circuit court of his own State and a State court, the holder would always desire to bring suit against the non-resident

maker in the State court. The same or like considerations which, in the one case, would induce the assignee of a chose in action to bring suit in the federal court, would induce him to sue the obligor, in the other alternative, in the State court.

Congress has, however, wisely enacted, that when the holder of such an instrument has exercised his option most favorably to himself, and has gone into his own State court against the non-resident maker, who has been found within his State, the non-resident party may remove the case into the national tribunal. This he would always do against the desire and interest of the plaintiff. The circuit court, in this way, would acquire jurisdiction against the will of the plaintiff.

And it would seem that Congress intended that the non-resident defendant should enjoy the benefit of this jurisdiction, whether or not the assignor of the resident plaintiff could have sued the defendant in the circuit court.

What advantage can it be to the non-resident defendant in the State court that the assignor of the resident plaintiff is not a citizen of the same State as the plaintiff? The possible local prejudice against the defendant is not diminished. And, on the other hand, what disadvantage to such a defendant arises from the assignor of the resident plaintiff being a citizen of the same State with the plaintiff?

The relation of the defendant to the local State forum is not changed. In each case—whether the immediate assignor of the resident holder be or be not, like him, a citizen of the State in which the suit is brought—the maker, if sued in the State court, is at a disadvantage; and it was this consideration that induced the wise men who framed the judiciary act to make provision for the removal of such a case into a tribunal where both parties would stand upon an equal footing.

Manifestly non-resident defendants, in a large class of cases, would be wholly deprived of the benefit which the 12th section was intended to confer, if it should be held that the restriction in the 11th section, upon the jurisdiction of

the circuit courts, prevails in cases removed into those courts from State courts.

II. It has been judicially held that a suit against a foreign corporation may be removed, and the circuit court will retain jurisdiction of it, although such action could not be there commenced, under the 11th section, by original process.

Bliven *v.* New England Screw Company, 3 Black C. C., 111.

Barney *v.* Globe Bank, 11 Am. L. R., 221.

III. The cases which are relied upon by the defendants in error for the soundness of proposition 5, on page 3 of their brief, decide nothing more than that the rule relative to suits instituted in the courts of the United States, that where the jurisdiction depends on the character of the parties, *all* the individuals composing the respective parties, plaintiff and defendant, must possess the requisite character, is applicable also to suits removed from the State courts. This doctrine is not disputed. But this and nothing more was determined by Justices Washington, Thompson, and Story, in the cases of

Beardsley *v.* Torrey, 4 W. C. C., 286.
Ward *v.* Arredondo, 1 Paine, 410.
Smith *v.* Rines *et al.*, 2 Sumner, 345.

IV. We contend, therefore, that whether or not Mills & Frisbey, the supposed assignors of the claim on which the plaintiffs brought suit, were citizens of Louisiana, the circuit court possessed jurisdiction to determine the cause, the plaintiffs being citizens of the State where the suit was brought and the defendant being a citizen of Connecticut.

Third Point. Whether this be correct or not, the plaintiffs have an original right of action, if any, against the defendant, independent of any assignment by Mills & Frisbey, their agent in the alleged transaction recited in the petition.

I. Mills & Frisbey, it is alleged, received from the plain-

tiffs a sum of money in cash for the purchase of cotton. The cotton was to be bought and shipped to plaintiffs at New Orleans. The defendant, it is alleged, knowing that this money belonged to plaintiffs, and knowing that it had been intrusted to Mills & Frisbey for the purchase of cotton for plaintiffs, borrowed it, promising to return it in a few days, which, it is alleged, he failed to do.

If the court will look into the proofs as they appear to be, it will be seen that Frisbey stated that he handed the defendant the original package of money, which, as he says, had never been opened from the time he got it from the plaintiffs. (Rec., p. 20.)

Now, it is clear, upon the face of this statement, if it is a correct version of the transaction, that the defendant is directly liable to the plaintiffs for this money in an action for money had and received.

Moses *v.* Macferlan, 2 Burr, 1012.
Clarke *v.* Shee, Cowp. R., 197.
Penniman *v.* Patchin, 5 Vermont, 346.
Mason *v.* Waite, 17 Mass., 558.
Hall *v.* Marston, 17 Mass., 579.
Lime Rock Bank *v.* Plimpton, 17 Pick, 160.
Thompson *v.* Perkins *et al.*, 3 Mason, 232.

Whenever one man has in his hands the money of another, which he ought to pay over, he is liable in this action, although he has never seen or heard of the party who has the right. The law creates the privity and the promise.

Where a purchaser, at the time of the contract, knew that the seller was not the owner of the goods, but the factor, the right of set-off against the factor does not exist, whether the suit is brought in the name of principal or by the factor in his own name.

Parker *v.* Donaldson, 2 W. & S., 21, *et cas. cit.*
Edmond *v.* Caldwell, 15 Maine, 340.

II. If this view of the relation of the parties, and the liabil-

ity of the defendant, upon the facts averred in the petition, be correct, then the disability of the assignors does not affect the plaintiffs' right of action in the circuit court and its jurisdiction of the case.

Bank of Kentucky *v.* Wister *et al.*, 2 Pet., 318.
Young *v.* Bryant, 6 Wh., 146.
Bullard *v.* Bell, 1 Mason, 251.

Fourth Point.—It is submitted, lastly, that this is not a suit to recover the "*contents*" of a *chose in action* within the sense and meaning of the 11th section of the judiciary act.

Deshler *v.* Dodge, 16 How., 630.
Barney *v.* Globe Bank, 11 Am. L. R., 229.
Bobyshall *v.* Oppenheimer, 4 W. C. C. R., 482.

Fifth Point.—The judgment remanding the case to the State court should be reversed, and the cause should be restored to its place in the circuit court.

J. Hubley Ashton,
Of Counsel for Plaintiff in Error.

Supreme Court of the United States.

WM. H. BUSHNELL,
PLAINTIFF IN ERROR.
vs.
S. H. KENNEDY & CO.,
DEFENDANTS IN ERROR

In error to the Circuit Court of the United States for Louisiana.

BRIEF OF COUNSEL OF DEFENDANTS IN ERROR.

Defendants in error, S. H. Kennedy & Co., citizens of Louisiana, commenced suit in one of the State courts in New Orleans, by process of attachment, against the plaintiff in error, Wm. H. Bushnell, a non-resident of the State, to recover seven thousand five hundred dollars.

See prt. Rec., pp. 1 and 2.

The plaintiff in error appeared, and prayed for the removal of the cause to the Circuit Court of the United States for the District of Louisiana, alleging himself to be a citizen of Connecticut, and the order of removal was granted.

See Rec., pp. 6 and 7.

The plaintiff in error filed his answer to the petition in the Circuit Court of the United States, on the 25th November, 1867.

See Rec., p. 9.

The cause came on for trial before the court above, on 7th March, 1868, and the suit was dismissed for want of jurisdiction in the Circuit Court.

See Rec., p. 12.

But, at the suggestion of the counsel of plaintiff in the court below, the order of dismissal was changed to one

remanding it to the State court, whence it had been transferred.

See Rec., pp. 12 and 13.

W. H. Bushnell, the defendant below, then swore out a writ of error to bring the proceeding before this court for review.

POINTS.

1. The judge of the court below seems to have raised the question of jurisdiction *ex mero motu*, since it does not appear as pleaded either by plaintiff or defendant there.

It is to be presumed that the court below founded its judgment on the want of an averment in the petition transferred from the State court, that Mills & Frisby, who had assigned to petitioners, S. H. Kennedy & Co., the claim the latter sued on, could have brought suit in the Circuit Court.

2. The petition avers the plaintiffs in the court below to be assignees of a debt due by Bushnell, the plaintiff in error, to Mills & Frisby, but it contains no averment that Mills & Frisby were competent to bring suit against Bushnell in the U. S. Circuit Court: this would not have been sufficient to give the Circuit Court jurisdiction, had the suit been originally brought there.

See sec. 11, Act of Sept. 24, 1789.
1st Statutes at Large, p. 79.
Turner *vs.* The Bank of North America, 4 Dallas, p. 8.
Mollem *vs.* Torrance, 9 Wheaton, p. 538.

3. The same rule governs where the case is one transferred, as this is, from a State to a Federal court.

The twelfth section of the Judiciary Act of 1789 declares that when the cause is transferred to the Circuit Court, "it shall there proceed in the same manner as if it had been brought there by original process."

Now, as is evident, a suit brought by original process in a Circuit Court of the United States, on a *chose in action* assigned to the plaintiff, must show on the face of the record that the action could be maintained under the jurisdiction of the court, if no assignment had been made; but the petition of the defendant in error, originally filed in the State court and transferred to the United States Circuit Court, does not show on its face that the parties, Mills & Frisby, who assigned the claim sued on to Kennedy & Co., could have brought suit against Bushnell by original process in the Circuit Court; therefore it follows that this suit could not be proceeded with in the Circuit Court, which was, indeed, without jurisdiction on the face of the record.

4. The theory of the 11th section of the Judiciary Act of 1789 is, that the civic title or quality of citizenship pertaining to him who assigns a *chose in action* is transferred by the assignment to the assignee, and will disqualify the latter, however qualified otherwise he may be, from suing in the Circuit Court, if the former were himself disqualified; and if his quality be not affirmatively set forth, it is as if he were presumed to be disqualified, and the suit cannot be maintained; or, as an equivalent expression, the citizenship of the assignor of the *chose in action* must be alleged in the petition.

5. No case can be removed from a State court to a Circuit Court of the United States unless by both the Constitution and the judiciary acts the United States courts might have taken jurisdiction of it, had it been originally brought there.

Conkling's Treatise, (1856,) p. 177.
Smith *vs.* Rines, 2 Sumner, p. 345.
Beardsley *vs.* Torrey, 4 Washington, 288.

Respectfully submitted.

THOMAS J. DURANT.
for Kennedy & Co., Defendants in Error.